No. 1243.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

HENRY WINTERS, et al.,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF THE APPELLEE.

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I.

This suit involves the right of the United States, the appellee, and of the Indians residing upon the Fort Belknap Indian Reservation, to the use of the waters of Milk River, for useful and beneficial purposes upon the reserve. The Ft. Belknap Indian Reservation was established by the treaty or convention between the Government of the United States and the Indians of May 1, 1888, (25 St. at L. 124), and comprises an area of about fourteen hundred square miles, or approximately one million

acres of land. The greater portion of this is grazing land, and "well adapted to stock raising", (29 St. at L. p. 351), however large and extensive tracts are likewise suitable and well fitted for agriculture, and of the latter, "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk River," (Tr. p. 82). But little water is to be found upon the reservation itself, and this scarcity of water, "renders the pursuit of agriculture difficult and uncertain". (29 St. at L. 351). The center of Milk River is the northern boundary line of the reserve throughout its entire width (25 St. at L. p. 124), and this stream is the only source of supply for the various uses of the Government and the Indians at the agency and for irrigating purposes generally on the reserve. Since 1889 and 1890, a portion of the waters of the stream have been continuously used by the Government and the Indians for household, domestic and irrigating purposes at and near the agency proper, and this is the only source of supply from which to satisfy their requirements and necessities at that place, (Tr. p. 9-10; p. 80-81); and since the year 1898, water has been taken from Milk River by means of a canal, and used on the reservation for the purpose of irrigating the cultivable lands susceptible of irrigation with the waters of that stream. (Tr. pp. 9-10-11). At the present time "approximately five thousand acres of land are being irrigated upon said reservation, for the purpose of producing thereon crops of hay, grass, grain, and vegetables, with waters diverted

by means of said canal and lateral ditches, distributing said waters from said canal over the lands". (Tr. pp. 81-82). This canal has a carrying capacity of at least five thousand inches of water, (Tr. p. 82); and at least five thousand inches of the water of Milk River are required for the present needs and requirements of the Government and the Indians for household, domestic, agricultural and irrigating purposes on said reserve. (Tr. p. 82). Besides stock raising, principally horses and cattle, has always been, and is now, extensively carried on by the Indians everywhere on the reserve, in fact "the main reliance of these Indians for self-support is to be found in cattle raising", (29 St. at L. p. 351), and the stock, ranging and feeding in the northern portion of the reserve, all along the channel of the stream from the eastern to the western limits of the reserve, must depend principally upon Milk River for drinking water, (Tr. pp. 12-13). At the time of the institution of this suit, not a drop of water reached any part of the reservation, but the same having been diverted by the defendants, the Government and the Indians were deprived not only of the water necessary for agricultural and irrigating purposes, but of all water which was needed for their household and domestic wants, which resulted in actual suffering and distress. (Tr. pp. 14-17).

The diversion of the waters of the stream by the defendants, as alleged in the bill of complaint, is admitted, but they seek to justify their acts on the ground

that the waters of the stream in question were legally and properly appropriated by them, and each of them, for a beneficial and useful purpose, under the laws of the State of Montana, authorizing the appropriation of the waters of the stream within that state for household, domestic, agricultural, irrigating and other proper purposes, as the same are sanctioned, recognized, and confirmed by the Federal statutes. Their position, therefore, in this controversy is that of *appropriators of water,* and the rights relied upon and asserted by them are those, and those only, that enure to appropriators of water under state and federal laws.

We assert here, the same as we contended upon argument in the court below, that the waters of Milk River, being a part and portion of the Ft. Belknap Indian Reservation, and needed upon said reservation for domestic, agricultural, irrigating and other proper and useful purposes, *never were,* and *never became* public waters subject to appropriation by any person under state or federal laws.

It is firmly settled and established that the doctrine of appropriation, under state statutes, recognized and protected by Section 2339 of the U. S. Revised Statutes, applies only to the public lands and waters of the United States.

Smith vs. Denniff, 24 Mont. 20; 50 L. R. Ann. 737.

3 Farnham on Waters, Sec. 659.

Curtiss vs. Water Co., 10 L. R. Ann. 484.

Benton vs. Johncox, 39 L. R. Ann. 107.

Taylor vs. Abbott, 37 Pac. 408.

Cruse vs. McCauley, 96 Fed. 369.

Sturr vs. Beck, 133 U. S. 541.

17 Am. and Eng. Ency. of Law, 2nd Ed. p. 507.

And it is equally well settled that:

"Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the public lands, and that no subsequent *law*, *proclamation*, or *sale* would be construed to embrace or *operate* upon it, although no reservations were made of it."

Wilcox vs. Jackson, 13 Pet. 498.

Leavenworth R. R. Co. vs. U. S., 92 U. S., p. 740 et seq.

R. R. Co. vs. Roberts, 152 U. S. 117, 118.

U. S. vs. Carpenter, 111 U. S., 347.

Spalding vs. Chandler, 160 U. S., 394.

Kinney on Irrigation, Secs. 133, 124.

Apis vs. U. S., 88 Fed. 931.

Prior to 1855-1856, in fact at all times prior to the enactment of any law recognizing the right of approp-

riation, all of the country now embraced within the State of Montana, was Indian country. By Article 4 of the treaty of October 17, 1855, proclaimed April 25, 1856, there was established and reserved to the Ft. Belknap Indians and other Indian tribes, as and for their home and abiding place, practically all that part of the state lying north of the Musselshell River and extending from the crest of the main range of the Rocky Mountains eastward approximately to what is now the western boundary line of the Fort Peck Indian Reservation.

Revision of Indian Treaties p. 7; 11 St. at L. p. 658.

By the terms and provisions of this treaty the Fort Belknap Indians reserved to themselves the

> "uninterrupted privileges of hunting, *fishing*, and gathering fruit, grazing animals, curing meat and dressing robes."

Article 3, of the Treaty.

And the territory so set apart and reserved to them at that time, embraced the channel and waters of Milk River from its source to its mouth lying within the confines of the United States.

This continued to be the place of abode of these Indians until 1874, at which time their territory was reduced, so as to embrace, roughly speaking, all that part of Montana lying to the north of the Missouri River and

extending from the Rocky Mountains eastward to the Dakota boundary line, including Milk River.

Act of April 15, 1874; 18 St. at L. p. 28.

The tract, so set apart, remained Indian country, and the Indian Reservation of these Indians, until 1888, at which time the present Ft. Belknap Indian Reservation was carved out of the larger reserve established in 1874, as their "*permanent home*", with the center of Milk River as the northern boundary line of the reservation, and which is now its northern boundary line.

Act of May 1, 1888; 25 St. at L. p. 124.

It is clear, therefore, that no part of the territory now contained and embraced within the boundary lines of the Ft. Belknap Indian Reservation, ever was or became public land. And it is palpable that no part or portion of the lands and the property rights appurtenant thereto, embraced and constituting a part of said reservation, ever became subject to any "*law,* proclamation or *sale*" concerning or of public lands, and no law, proclamation or sale relating to, or of, public lands, could be in any manner construed to embrace or operate upon any portion of the Ft. Belknap Indian Reservation.

As stated by the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on p. 742:

> "As long ago as the Cherokee Nation vs. Georgia, 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right

to the lands they occupy, until it shall be extinguished by a *voluntary cession* to the government; and recently, in United States vs. Cook, 19 Wall 591, that right was declared to be *as sacred* as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe *against intrusion*, if the government discharged its duties to them."

And, after quoting from Wilcox vs. Jackson, 13 Pet. 498, to the effect that:

> "Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the public lands; and no subsequent law, proclamation, or sale would be construed to embrace or operate upon it."

the court proceeds to say that this doctrine:

> "Applies with *more force to Indian* than to military reservations. The latter are the absolute property of the government; in the *former* (Indian reservations), *other rights are vested.*"

And so in R. R. vs. Roberts, 152 U. S. pp. 117-118, the court said:

> "It has always been held that the occupancy of lands set apart *by statute* or *treaty* with them (the Indians) for their use, cannot be disturbed by claimants *under other grants* of the government. And

> the setting apart *by statute* or *treaty* with them of lands for their occupancy is held to be of itself a withdrawal of *their character as public lands*, and consequently of the lands from sale and preemption."

And such withdrawal or reservation, by statute or treaty, is, as said by Judge Field in U. S. vs. Carpenter, 111 U. S. 347:

> "Notice that the land" (and the "*whole*" thereof, See concluding part of opinion)—"will be retained by the government for the use of the Indians, and this purpose cannot be defeated by the action of any officers of the land department."

It follows from this that the waters of Milk River never were or became public waters upon which the statutes conferring the right of appropriation could operate. The Indians and the government, acting together for the accomplishment of a certain well defined object or purpose, reserved to themselves,—the Government to itself and the Indians, the Indians to themselves, —one half of the stream, *in corpore*, as it then existed, as a part and parcel of the Ft. Belknap Indian Reservation. But this was not all. As riparian owners, the treaty establishing the reservation *ex proprio vigore* attached to it, as a further and additional part and portion of said reserve, and reserved to the parties, all the rights incident to and growing out of the status of ripar-

ian proprietorship. It reserved to them their riparian rights to *all of the waters of the stream.*

> "Riparian rights are those which attach to the ownership of land through, or past which, a river runs."

24 Ency. of Law, 2nd Ed., p. 978.

Kinney on Irrigation, Sec. 55.

And

> "these rights are not easements or appurtenances, but are inseparably annexed to the land and *a parcel of the land itself,* they have been designated as natural rights and are said to exist *jure naturae.* They are as much a part of the *soil as the stones scattered over it.*"

30 Ency. of Law, 2nd Ed., p. 352.

Angell, Water Courses, Sec. 5.

Schwab vs. Beam, 86 Fed. on pp. 42-43.

Benton vs. Johncox, 39 L. R. Ann. on p. 109.

In the words of the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on page 747:

> "The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein, and had title thereto. In one sense, they were reserved to the Indians; but, in

another and broader sense, to the United States, for the use of the Indians."

In conclusion of the discussion upon this point, we quote from the cases of United States vs. Rio Grand Dam and Irrigation Company, where the Supreme Court of the United States, in considering the congressional legislation, which recognizes and sanctions the right to appropriate water, defines the operative effect of this legislation, and expressly limits and confines it to the public lands, as follows:

"The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. * * * While this is undoubted, and the rule obtains in those states in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a state may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. * * * Yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

It then quotes the Act of July 26, 1866, which is Section 2339 of the Revised Statutes of the United States, and says:

> "The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water."

And then, after quoting from Broder vs. Natoma Water and Mining Co., 101 U. S. 274, and the Acts of March 3, 1877, commonly known as the "Desert Land Act", and the Act of March 3, 1891, granting the right of way over and through government reservations for canals and waterways, which comprises all the laws of Congress bearing on the subject of appropriation, the Court proceeds as follows:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. * * * This legislation must be interpreted in the light of existing facts—that all through this mining region in the west were streams not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all those cases of purely local interest the obvious purpose of Congress was to give its assent, *so far as the public lands were concerned*, to any system, although in contravention

of the common-law rule, which permitted the appropriation of those waters for legitimate industries."

Approved in:

Gutierres vs. Albuquerque L. & I. Co., 188 U. S. 545 on p. 554.

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II.

This brings us to a consideration of the rights of the Government as a riparian proprietor, or, as the proposition is somewhat too broadly stated by the counsel for the appellants: "Whether the United States has any, and if any, what rights as a riparian owner, to the waters of Milk River as against appropriators under state laws." And here again we submit, as we urged in the court below, that the United States is now and always has been a riparian proprietor of the waters of Milk River, and as such riparian proprietor it has the absolute and unquestionable right to have the waters of the river flow down the natural channel of the stream to supply its requirements and necessities there for domestic, agricultural and irrigating purposes, in order to fully and effectually carry out the objects and purposes for which the reservation was established.

And here we desire to point out, in the first place, that we are not now concerned with the question of the

rights of riparian owners as against the rights of appropriators "under state laws" generally, but only as recognized and defined under the laws of the State of Montana, as the same are construed and interpreted by its highest court. Nor is it in this case at all necessary to inquire or discuss, whether, as apellants' counsel express it, the United States, "*in its governmental capacity,* as between it and its citizens", can be said to be the riparian owner of the waters of the stream, because the rights of the United States, incident to the ownership of "public lands" generally, "*in its governmental capacity*",are not involved in this controversy. On the contrary, the rights of the Government here to be determined are those incident to and growing out of the ownership of lands held and used by it in the character of a private or proprietary owner of a tract of land bordering on a stream, reserved, set apart, and appropriated for a particular purpose. This purpose was to give "*permanent homes*" to these Indians, and all the rights attached to and connected with the lands reserved, ex vi termini enured to the Indians, and they cannot now be deprived of any of them, nor can they be terminated or extinguished except by a voluntary cession by them to the federal government.

Kinney on Irrigation, Sec. 133.
R. R. Co. vs. U. S., 92 U. S. 733.

Any one owning lands bordering on a stream is a riparian proprietor, and speaking generally of the rights

of the government as the owner of such lands, whether held or owned by it as public lands, or as private, reserved, or proprietary lands, it has at least,

> "the same property and right in the streams flowing through them as any other proprietor would have."

Long on Irrigation, Sec. 26.

Union Mill & Mining Co. vs. Ferris, 2 Sawyer 176.

Krall vs. U. S., 79 Fed. 241.

Cruse vs. McCauley, 96 Fed. on p. 373.

Gould on Waters, p. 240.

Considering then, for the purpose of the argument, the riparian rights of the complainant from the standpoint of an ordinary riparian proprietor, we most cheerfully concede the correctness of counsel's position (Appellants' Brief p. 30),

> "that the rights of riparian owners are to be determined by state laws and decisions",

and we as readily also agree with them in their contention that:

> "As to the rights attaching to lands within the territorial limits of the state, whatever has become a settled rule of real property by the decisions of its courts is conclusive on this court".

Appellants' Brief, p. 30.

And from this it follows, as stated in Kinney on Irrigation, that:

> "Whatever may be the rules adopted by the statutes and decisions of any particular state with reference to the rights of riparian owners and appropriators, still that doctrine, heretofore described as originating from the local customs of miners and sustained by the legislation of Congress, is confined in its operation to the public domain of the United States, *and all extensions of this doctrine to other lands and other proprietors*, and all additional rules, *must necessarily proceed from the states themselves*".

Kinney on Irrigation, Sec. 145, pp. 220-221.

Citing: Pomroy's Riparian Rights, Sec. 30.

What, then, are the laws and decisions of the courts upon the subject of water rights in the State of Montana?

In Montana the settled law governing the acquisition of a water right, and the right to the use of water within that state, is, in a sense, *sui generis*. Of course, it is clearly established that a right to the use of water for any useful and beneficial purpose may be acquired by appropriation, but this method of obtaining a water right is confined

> "to the public domain owned by the United States",

and by statutory enactment it has been extended to

> "water on the *unsold* state lands."

In all other cases,

> "the right to the use of running water is a corporeal right or hereditament which *follows or is embraced by the ownership of riparian* soil. It is a corporeal right running with riparian lands".

And when it is sought to obtain the right to the use of waters where riparian rights have attached, it can

> "be acquired only by the grant, expressed or implied, of the owner of the land and water".

And

> "where the absolute title to riparian soil on a stream has passed from the United States before any right to the water by prior appropriation has become vested in any person, *no such right can be acquired afterwards under the grant of Congress;* and the common-law rule as to the right of riparian owners would apply, were it not for the fact that the State of Montana has by *necessary implication assumed to itself* the ownership, *sub modo*, of the rivers and streams of this state and, by Secs. 1880 et seq. of the Civil Code, has expressly granted the right to appropriate the waters of such streams, which right, if properly exercised in compliance with the requirements of the statute, vests in the appropriator full legal title to the use of such waters by virtue of the grant made by this state as owner of the water. But this privilege or right to appropriate the water of a stream can in any and every case be taken advantage of or exercised only by *one who has*

riparian rights, either as owner of the riparian land, or through grant of the riparian owner.''

With reference to rights

''acquired by appropriation and user of the water on the public domain,''

the same are

''founded in grant from the United States government as owner of the land and water,''

and

''such grant has been made by Congress''.

As to the unsold state lands,

''the right is conferred by Secs. 1880 et. seq., of the Civil Code, but such permission *can and does apply only to lands owned by the state.* As owner of the stream, it has granted the right to appropriate the water of the stream, yet it does not pretend to legalize the exercise of such privilege, in violation of the vested rights of other land owners. * * * It may be remarked, *obiter,* that the common-law doctrine of riparian rights assured to each riparian owner the right to the *reasonable* use, without substantial diminution in quantity or deterioration in quality to the detriment of other riparian proprietors, of the waters of a stream flowing by or over his land. The doctrine of 'prior appropriation' confers upon *a riparian owner,* or one having title to a water right by grant from him, the right to a use of the water of a stream which would *be unreas-*

onable at the common-law, and to *this extent* the doctrine of prior appropriation may be said to have abrogated the common-law rule".

The portions above quoted are excerpts taken from:

Smith vs. Denniff, 24 Mont. 20; 50 L. R. Ann. 737.

Now, it is undoubtedly true that Montana, at the time of its admission to statehood, might have "*assumed to itself*" the absolute ownership of the streams and waters of the state, as was the case with Wyoming, (Kinney on Irrigation, (Sec. 482), and Colorado, (idem, Sec. 556), instead of assuming it, in the language of the court, "*sub modo*", that is to say, in a qualified sense, to-wit: in every respect regardful of and subject to the vested and accrued rights of riparian owners.

The state might likewise undoubtedly have abrogated and abolished the doctrine of riparian proprietorship *in toto* by statutory enactment, rather than to the limited extent as declared by the Supreme Court of the State. But it has never done so, and it is a demonstrable fact that from the very time of the organization of the territory, and continuing on during the territorial regime, as well as under state government, the statutory law, as well as the decisions of the court, have recognized and applied the doctrine of appropriation only to the extent as defined by the Supreme Court in Smith vs. Denniff, *supra*, and at no time has there been anything either

in the laws of the Territory or of the State, or in the decisions of the court of last resort, disclosing or evincing any intention to abrogate riparian rights in favor of rights acquired by appropriation, or to subordinate the rights of the riparian owner to the rights of the appropriator.

Thus the first Territorial Legislative Assembly, on the 12th day of January, 1865, passed an act entitled, "An Act to protect and regulate the irrigation of lands in Montana Territory," the first section of which said act provided as follows:

> "That all persons who claim, own, or hold a possessory right or title to any land, or parcel of land, within the boundary of Montana Territory, as defined in the organic act of this Territory, when those claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river, for the purpose of irrigation, and making said claim available *to the full extent of the soil* for agricultural purposes."

And the fourth section of the act was as follows:

> "That in case the volume of water in said stream or river shall not be sufficient to supply the continual wants of the entire country through which it passes, then the nearest justice of the peace shall appoint three commissioners, as hereinafter provided, whose duty it shall be to apportion, in a just and equitable proportion, a certain amount of said

water, upon certain alternate weekly days, to different localities, as they may in their judgment think best for the interest of all parties concerned, and with a due regard to the legal rights of all."

In construing this Act in the case of Thorp vs. Freed, Chief Justice Wade of the Territorial Supreme Court, said:

"If this section of the law does not mean that there shall be an equal distribution of the waters of a stream among all the parties concerned in such water, without any regard whatever to the date of location or appropriation, then we are utterly unable to comprehend the language used. It provides that the commissioners shall apportion the water of the stream in a just and equitable manner among all the parties along the stream. Suppose one man had appropriated all the waters of a stream, and twenty other men lower down had and owned farms through which the stream ran, can it be doubted that under this statute the commissioners would have been compelled to apportion the waters of the stream among the riparian owners equally? It seems to me the question does not admit of a doubt."

Thorp vs. Freed, 1 Mont. on pp. 668-669.

Section 1, of the Act of January 12, 1865, of the Territorial Legislature, remained upon the statute books of the Territory and subsequently of the State of Montana, substantially in the same form as originally enacted, until the adoption of the Civil Code of 1895, the provisions

of *that code* upon the subject of water rights being the ones referred to and construed by the Supreme Court of Montana in Smith vs. Denniff, supra.

See also

Benton vs. Johncox, 39 L. R. Ann., on p. 111,

where a similar act of the Territory of Washington is referred to and construed.

Moreover, while the question of the rights of riparian proprietors as against those of appropriators was conclusively settled and determined under the laws then in force and existing in Montana, and set out in counsels' brief, in Smith vs. Denniff, *supra*, practically the same result had been reached and the same doctrine recognized and established as controlling in Montana by the territorial Supreme Court in the case of Thorp vs. Freed, *supra*, in 1872.

The syllabus upon this point, as prepared by the official reporter, and which is as follows:

> "WATER—appropriation for irrigation—riparian proprietors—laws of Territory and Congress relating to water rights—local customs. WADE, C. J., and KNOWLES, J., have discussed these questions in their opinions and arrived at *different conclusions*. MURPHY, J., could not act as a member of the court, and did not express any opinion at the time the case was examined. There is no opinion of the court and a syllabus of these opinions is omitted by the reporter",

is misleading and not borne out or verified by the facts. The two Judges mentioned did not arrive at "different conclusions", upon the question of the applicability and controlling force of the doctrine of riparian proprietorship in Montana, but the difference of opinion existed simply as to the conditions under, and the time at which the doctrine could be invoked and applied. While Chief Justice Wade held that the doctrine of appropriation, and any rights acquired by virtue of appropriation, could only be recognized with relation to lands so long as the paramount title remained in the general government, in other words, so long only as the lands upon which the appropriated waters were being used remained *public lands*, and that a grant by the government of riparian lands abrogated the doctrine of appropriation and all rights which might have been acquired thereunder, Judge Knowles held that, quoting from his opinion in the case on pp. 660-661:

> "Whatever rights the parties had in relation to the waters of the Prickley Pear Creek, vested before any of these parties acquired their rights to the land under the general government. This decision, it will be understood, *does not go to the extent* of allowing parties to appropriate and divert water so as to prevent the same from flowing over land *to which a party had obtained the government title after the acquisition of this title.* If no one *before the preemption and entry* of land by a party has acquired the right to divert the waters of a stream, *then the*

patent from the general government conveys the water as an incident to the soil over which it flows. If it has been appropriated before the time when the patent takes effect, it does not."

Upon this point, the views of the Chief Justice, were, quoting from his separate opinion on pp. 681-682, as follows:

"In the case before us, both plaintiffs and defendants have acquired titles to their lands from the government, and when the title passed from the government *to riparian owners,* the *rights acquired* by prior appropriations, as applied to government lands while the title is yet in the government and the occupiers are mere tenants at will, *is not applicable and falls to the ground.* Conceding the fact, that the government retains the right to the final disposition of the soil and the waters flowing over the same, and this result must inevitably follow, and each purchaser from the government, of lands along a stream, acquires all the title of the grantor, and this title carries with it property in the soil and water naturally flowing over the same. If this is not the case the prior appropriator takes title to the water as against the government.

"We therefore conclude that the doctrine, that he who first appropriates the waters of a stream can hold the same as against subsequent riparian owners, for the purposes of irrigation and agriculture, is inapplicable to lands situate along the banks of a stream where title to such lands has

passed from the government to riparian owners, for the very act of transferring the title carries with it the freehold, and this includes a title to the water that flows over or along the boundary of the lands thus transferred; and the act of congress of July 26, 1866, is not at all in conflict of this view of the case. That act is applicable to rights acquired while the title yet remains in the government, and the occupiers are mere tenants at will."

These excerpts from the two opinions of the Judges clearly show that there was no difference of views concerning the controlling force and effect of the doctrine of riparian proprietorship in the determination of questions relating to the use of waters, but, as stated before, the only difference disclosed is as to the particular circumstances under which it may be applied and given effect, and the decision of the Supreme Court of the United States in Sturr vs. Beck, 133 U. S. 541, establishes the correctness of Judge Knowles' position in the Montana case.

And that doctrine has existed and been recognized in Montana from that time to this:

Smith vs. Denniff, 24 Mont. 20; 60 Pac. 398; 50 L. R. A. 737; 81 Am. St. R. 408.

Cruse vs. McCauley, 96 Fed. 369.

Willey vs. Decker, 73 Pac. on p. 214, second column.

Long on Irrigation Sects. 10, 29, notes 35 and 36.

17 Am. & Eng. Ency. of Law (2nd Ed.) pp. 491, 485.

Having thus shown that the doctrine of riparian proprietorship, modified to the extent as defined by the Supreme Court in Smith vs. Denniff, is recognized and applied in the State of Montana, we now come to inquire as to the rights of the complainant as a riparian proprietor, considering the matter, for the purpose of the argument at this time, purely from the standpoint of riparian ownership, putting the Government in the attitude of any other riparian owner, owning and holding lands along the stream in question in private or proprietary, as distinguished from public, ownership, and without reference to other features or other elements in the case decisive of the Government's contention in its favor. It cannot, and will not, be successfully disputed that the Government always has been, and it is now, a riparian owner on the channel of Milk River, and was such before, and at the time when, the waters of said stream were appropriated and diverted by the defendants in this case. As such riparian owner, under the decision in Smith vs. Denniff, no appropriation of the waters of Milk River could legally be made to the prejudice of the complainant's riparian rights. And for the complete enjoyment of those rights, it was entitled

"to the reasonable use, without substantial

diminution in quantity or deterioration in quality to the detriment of other riparian proprietors, of the waters of the stream."

That is to say, it was and is entitled to the natural flow of the water in and down its accustomed channel, and use it for domestic purposes, and to a reasonable extent for irrigating its riparian lands.

Union Mill & Min. Co. vs. Dangberg, 81 Fed. on p. 106.

Long on Irrigation, Sec. 11.

Pomeroy Riparian Rights, Sec. 125.

Benton vs. Johncox, 17 Wash. 277; 39 L. R. Ann. on p. 112.

Isom vs. Nelson Mining Co., 47 Fed. pp. 200-201.

Hoge vs. Eaton, 135 Fed. on p. 414.

By virtue of the statutory provisions of this state, upon the subject of water rights, quoted in counsels' brief, as construed and interpreted by its Supreme Court, the rights of the riparian proprietor have been extended and enlarged so as to enable him, by appropriating and diverting, as prescribed by statute, sufficient water for that purpose, to irrigate his riparian lands "*to the full extent of the soil for agricultural purposes*", irrespective of the needs and requirements of other riparian owners, whose riparian rights, either in the limited sense of the common-law rule, or the broader sense of the statutory

provisions, as defined by the Court, had not *then* accrued or become vested.

The very Chapter of laws, concerning "Irrigation and Water Rights" in Montana, "in force", as counsel correctly states, "during the period of time covered by this controversy", and from which some sections are taken and quoted in appellants' brief, while others are, for some reason, discreetly omitted, and for reference noted as being found in "Compiled Statutes of Montana, Fifth Division, p. 995", without, however, apprising this Court of the year when these "Compiled Statutes" were in fact compiled and in force, simply informing this Court that these laws were "carried into" the Code of 1895, and the very first section of this Chapter of laws, being Section 1239 of the Fifth Division of the Compiled Statutes of Montana of 1887, at page 992 thereof, provided that:

> "Any person or persons, corporation or company, who may have or hold a title, or possessory right or title, to any agricultural lands within the limits of this territory, as defined by the organic act thereof, shall be entitled to the use and enjoyment of the waters of the streams or creeks in said territory for the purposes of irrigation and making said lands available for agricultural purposes *to the full extent of the soil thereof.*"

As heretofore shown, this section, substantially in form as it appears in the compiled laws of 1887, had

been construed by the Supreme Court of the Territory as far back as 1872, as recognizing the rights of riparian proprietors, and to the same effect by the Supreme Court of Washington in Benton vs. Johncox, supra.

And again this Chapter of laws, entitled in the Compiled Statutes of 1887, "Irrigation and Water Rights", and "in force during the period of time covered by this controversy", expressly provided that the "*Chapter*" should not be:

> "So construed as to impair, or in *any way or manner* interfere with, the rights of parties to the use of the water of such streams or creeks *acquired before its passage.*"
>
> Section 1245, p. 994.

And while in controversies, respecting the right to water in the territory, the rights of the parties were to be determined by the dates of appropriation, such determinations were to be had:

> "*with the modifications heretofore existing* under the local laws, rules, or customs and *decisions of the Supreme Court of the territory.*"
>
> Section 1249.

Whenever a person becomes entitled to the use of water by virtue of his riparian proprietorship, such a right becomes a vested right to the use of the water to the extent of his requirements and necessities for domestic, agricultural, and irrigating purposes, which right to

that extent, becomes superior and paramount to every other right riparian, as well as by appropriation, subsequently initiated and obtained.

Cruse vs. McCauley, 96 Fed. 369.

And, in this connection, it is at this time unnecessary to inquire, although we shall have something to say upon that point in another place, whether the complainant, at the time of the appropriation and diversion of the waters of Milk River by the defendants, had become entitled to or vested with the right to use the waters of the stream in question to the extent warranted under the state statute, as defined by the Supreme Court of the State, or whether it was confined to the use authorized under the doctrine of riparian rights. As against the defendants it was then, at any rate, and in any event, entitled to the natural flow of the waters of the river down its accustomed channel to the place of its riparian uses, to-wit: the Ft. Belknap Indian Reservation. And no law in force in the State of Montana pretends, in the language of the Montana Court, "to legalize the exercise of the right to appropriate the water of the stream, in violation of such vested rights."

We have heretofore shown, in another part of this brief, that the lands and waters in this suit, never were or became public lands and waters subject to or affected by any law, state or federal, authorizing the appropriation of the waters found upon the public domain. But in the preceding discussion of the question of riparian

rights, we have assumed, for the purposes of the argument, that they at one time were or might have been so subject to such laws, and in the consideration of the subject of the riparian rights of the complainant, we have placed the government in exactly the same position that a private individual would occupy, seeking to protect his riparian rights in the waters of a stream, as against subsequent appropriators, as the same are recognized, established and enforced under the system of laws governing water rights in the State of Montana. We have seen that in Montana riparian rights are recognized and protected as fully and completely as the rights acquired by appropriation. And we submit that it makes absolutely no difference, for the proper determination of this suit, what particular system of laws relating to water rights may have been established in other states or districts, or what particular doctrines or principles have been enunciated by the courts of last resort in other jurisdictions as governing them. The law which controls in this case, as appellants' counsel concede, upon the question of riparian rights, is the law which prevails upon the subject in Montana.

Thus in Kinney on Irrigation, the rule of law is laid down as follows:

> "When a grantee of the United States obtains title to a tract of land through or adjoining which a stream of water runs, and the waters of a stream have not hitherto been appropriated, the grantee's

patent is not subject to any possible appropriation which may be subsequently made by another party, *unless the State or Territory in which the land is located has, by statutory enactments, abolished the common law theory of riparian rights.* If the land granted before any appropriation has been made is upon the public domain, within the boundaries of a State, the riparian rights of the grantee must be *determined and regulated wholly by the municipal law of the State,* over which Congress has no power whatever to legislate. And unless there is a State law upon the subject abolishing or modifying the common law of riparian rights within that State, subsequent appropriators of the stream must take the water subject to all of those rights of the riparian grantee."

Kinney on Irrigation, Sec. 135, p. 205; Sec. 145, pp. 220-221.

Pomeroy Riparian Rights, Sec. 30.

And that the doctrine of riparian rights has not been and never was abolished in Montana, and that the laws of that State authorizing and permitting the appropriation of water, do

"not pretend to legalize the exercise of such privilege, in violation of the vested rights of other land owners,"

has been distinctly and emphatically declared.

"As well", says the Court, "might it be said

that by reason of the game laws, permitting all persons to fish in the streams of this state, it therefore follows that anyone has a vested right to exercise this privilege whenever there is a stream, in defiance of the vested rights of the property owners, —that is to say, by reason of the game laws a landowner has no rights which a fisherman is bound to respect. The mere statement of such a proposition is a demonstration of its fallacy. It is therefore apparent that absolute legal title to a water right can only be acquired by grant, express or implied, of the riparian owner of the land and water."

Smith vs. Denniff, 24 Mont. on p. 24.

Cruse vs. McCauley, 96 Fed. 369.

This is the interpretation of the water right law of Montana by its highest court, and, as appellants' counsel themselves concede, it is binding and conclusive. As was said by Mr. Justice Field in Christy vs. Pridgeon, 4 Wall. 196, on page 203, in speaking of a law of the Republic of Mexico which had subsequently become, in effect, a local law of the State of Texas:

"The interpretation, therefore, placed upon it by the highest Court of the state must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles of lands in that state, *whatever may be our opinion of its original soundness.* Nor does it matter that *in the courts of other states,* carved out of the territory since acquired from Mexico, *a different*

interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, *follow the different ruling as far as it affects titles in those states.*"

Cited and quoted in:

Bank of Humboldt vs. Glass, 79 Fed. 706.

To the same effect:

Walker vs. New Mexico & S. P. R. Co., 165 U. S. 593.

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III.

To permit the diversion of the waters of Milk River by the appellants would be violative of the treaties, conventions, and agreements made between the United States and the Indians residing upon the reservation, and would deprive the Indians of rights and property reserved by and secured to them under the terms of such treaties, conventions and agreements.

The learned Judge presiding in the Court below held that in his judgment, "when the Indians made the treaty granting rights to the United States they reserved the right to the waters of Milk River, at least to an extent reasonably necessary to irrigate their lands." The correctness of this conclusion has already been incontrovertibly established in the preceeding part of this brief, and that independently of and without reference to the par-

ticular terms of the treaties or conventions in question as to the objects and purposes therein referred to for which the reservation was to be used and to which the lands were to be devoted.

We have seen that riparian rights are such as attach to the ownership of land through, or past which, a stream runs, and that these rights are not mere easements or appurtenances, but are inseparably annexed to the land and a part and parcel of the land itself. And it is equally well settled, that as a part and parcel of the land, they pass with the land *without any express reservation or grant.*

Pomeroy's Riparian Rights, Sec. 152.

Benton vs. Johncox, 39 L. R. Ann. pp. 109-110.

24 Ency. of Law, 2nd Ed. p. 981 and note 8.

Schwab vs. Beam, 86 Fed. on pp. 42-43.

Long on Irrigation, Sec. 78.

17 Ency. of Law, 2nd Ed. p. 493.

Obviously counsel are therefore grievously mistaken in their contention that: "If any such reservation is contained in the treaty it is there by implication". The property and property rights that were actually and expressly reserved for the use and benefit of the Indians, by the terms and provisions of the treaty, properly construed and interpreted, included the lands and the corpus of the water within the limits of the reserve

as defined by its boundary lines, and the right to the use of the waters of the entire stream bordering on the reserve.

A consideration of the treaties, conventions and agreements between the Government and these Indians, without taking into account in the discussion of that phase of the case, any rights accruing to and vested in the United States and the Indians by virtue of riparian proprietorship as heretofore discussed and referred to, leads to precisely the same result. Prior to the 1st day of May, 1888, the entire northern part of Montana north of the Missouri River and extending from the main range of the Rocky Mountains eastward to the Dakota line, was Indian country, reserved and set apart by the treaty of 1855 and 1856, as an Indian Reservation, and the home and place of abode of the Indians whose rights are involved in this suit. By the terms of that treaty the Indians reserved to themselves the "uninterrupted privilege of fishing" in the waters of the stream, and exacted from the Government, in consideration of various concesssions made by them, financial aid "in establishing and instructing them in *agricultural* and mechanical pursuits". (Article 10 of the Treaty, 11 St. at L. p. 659.). As has been seen their territorial abiding place, as defined by the treaty of 1855-1856, was reduced by the Act of April 15, 1874, to that portion of Montana lying north of the Missouri River, and finally in 1888, separate reservations, and among them the Ft. Belknap

Indian Reservation, were, by agreement and with the consent of the various Indian tribes theretofore inhabiting the Indian country east of the Rocky Mountains, carved out of and reserved from the vast tract of what was then, and always theretofore had been, Indian country, as and for the "permanent homes" of the various tribes and groups of tribes of Indians parties to said treaty or agreement. The territorial limits of the separate reservations were narrow and confined as compared with the areas formerly occupied by these Indians in common, and all lands, so formerly occupied by them, but not included in the newly established smaller separate reservations, were *ceded* and *relinquished* by the Indians and Indian tribes to the general government. But in thus voluntarily relinquishing their property rights to so large and extensive a domain, the Indians not only declared and made known the reasons which prompted them to do so, but they also defined the objects and purposes which they had in view, and the advantages which they believed would result to them by agreeing and consenting to this new arrangement. Besides, in consideration of the cession to the United States, and the relinquishment of valuable property and property rights, they again exacted in the most deliberate, precise and emphatic manner, in return for these valuable concessions made by them to the Federal Government, the same as they had done in 1855-1856, the financial aid, and the assistance of the General Government in other respects,

for the accomplishment of the various objects and purposes which, according to the treaty or agreement, was the moving cause which actuated the Indians to negotiate with the Government, and induced them to surrender large portions of their former possessions

Now, the treaty of 1888 most clearly speaks for itself as to the causes and reasons which promted the Indians to divest themselves of these large quantities of territory, as to the objects and purposes thereby intruded to be subserved, and the result which the Indians hoped and expected to obtain. The causes were that:

> "Whereas the reservation set apart by Act of Congress approved April fifteenth 1874 * * * is wholly out of proportion to the number of Indians occupying the same, and greatly in excess of their *present* and *prospective wants,*"

the Indians, in view of that condition of affairs, plainly apparent to and recognized by them, were

> "desirious of disposing of *so much therof* as they did not require."

But they did not intend to give it away, nor did they recognize the legal or moral right in any one to take it from them. They desired to dispose of it, offered to dispose of it, and finally did dispose of it *for pay*—for a valuable consideration—intended and designed to be used for the consummation of a certain clearly expressed purpose, to wit:

"in order to obtain the means to enable them to become self-supporting,*as a pastoral and agricultural people,* and to educate their children in the paths of civilization."

And:

"Therefore, to carry out *such purpose*",

they ceded and relinquished to the United States those portions of their former reservation which were not required for their present or future wants.

25 Statutes at Large, on pp. 113-114.

This is the unequivocal language of the Indians *themselves* as to the reasons why, and the purposes for which, the cession was made. It is their own declaration as to the policy which was to govern their future course of action, and the ends which they thereby hoped and expected to attain. Does it take "a flight of the imagination", as counsel contend, to conceive that the Indians meant just exactly what they said, viz: that they desired and intended to engage in "agricultural pursuits," but needed means and assistance to enable them to do so. Is there anything in this language of the Indians, declaring their wish and intention to become producers,—self-sustaining factors in industrial life—that the rights and privileges reserved by and conferred upon them to enable them to do so, were rights "which they did not then claim, and would not now exercise but for governmental compulsion". It is undoubtedly true, as counsel say, that "the

irrigation and cultivation of the Indian lands is a policy of the Indian Department", but whatever may be the "practice" in this respect as regards other Indians, it is plain that the Indians whose rights are involved in this case have themselves unmistakably declared in favor of that very policy. And whatever rights they obtained and secured by the terms of the treaty or agreement, for the purpose of enabling them to carry out this policy and realize the objects and purposes thereby designed, should be and will be protected and enforced by and in every court of the land.

In the words of the Supreme Court of the United States in Leavenworth R. R. Co. vs. U. S., 92 U. S. on pp. 746 and 747:

> "That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the government, and saved from a possible grant, is a proposition which will command universal assent. * * *
>
> "Every tract set apart for special uses is reserved to the government, to enable it to enforce them. There is no difference in this respect, whether it be appropriated for Indian or other purposes. There is an equal obligation resting on the government to require that neither class of reservations be diverted from the uses to which it was assigned."

Now, "in consideration of" this cession, the Federal Government unreservedly obligated and took it upon itself, not as a matter of favor, gift or gratuity, but in *pay-*

ment of a debt incurred and contracted for valuable property and property rights obtained by it in a transaction of bargain and sale between it and the Indians, to furnish the Indians the financial aid and other assistance demanded by them to carry on industrial pursuits, and in that way "become self-supporting, as a pastoral and agricultural people." The United States "*agreed*", to expend annually for a period of ten years, large sums of money, for the purpose of furnishing said Indians with:

> "Cows, bulls, and other stock * * * *agricultural and* mechanical implements, * * * school buildings, mills, and blacksmith, carpenter and wagon shops as may be necessary, *in assisting the Indians* to build homes and inclose their farms, and in other respects to promote their civilization, comfort and improvement."

Article III, 25 St. at L. 114.

And:

> "*In order to encourage habits of industry, and reward labor,*"

it was further provided, understood and solemnly agreed between the contracting parties,

> "that in the giving out or distribution of cattle or other stock, goods, clothing, subsistence and *agricultural implements*, as provided for in Article III, preference shall be given to Indians who endeavor by honest labor to support themselves, and especially

to those who in good faith *undertake the cultivation of the soil,* or engage in pastoral pursuits, as a means of obtaining a livelihood."

Article V, 25 St. at L. on pp. 114-115.

Now it would seem, in view of the plain language employed, that there could be no room for doubt, or any difficulty in determining, as to just what was meant and intended by the parties to the treaty. But it was contended by the learned counsel for defendants in the court below, that no intention is evinced or manifested by these agreements and stipulations that either the Indians or the Government contemplated the use of the waters of Milk River as an agency with which to effectuate the objects and purposes mentioned in the treaty. And now it is here asserted that "the right to irrigate lands was not a right possessed", nor ever exercised, or "*then claimed*" by the Indians, and to say that when the Indians declared their intention to carry on "agricultural pursuits", and become "an agricultural people", they intended and expected to carry on those pursuits by means of irrigating their lands, it would be forcing a construction of the terms of the treaty in such a way as to imply and signify "the practice of agriculture not as pursued by the Indians, but as developed by the scientists of modern times." It may here be suggested, in passing, that counsel seem to forget that, in the language or Mr. Kinney, (Kinney on Irrigation, Sections 10-17),

"irrigation is a very ancient art and was pract-

iced by the *earliest nations of the earth* upon a *most magnificent scale*",

and that:

> "probably the greatest souvenir left by the *aboriginal races of North America* is to be found in the *maze of prehistoric canals* found in the Salt River and Gilla Valleys of Arizona,"

water and irrigation systems constructed at a time, it is safe to assume, when the hoary forefathers of counsels' "scientists of modern times", garbed in skins, were still groping along, mentally and intellectually, in cimmerian darkness.

Be that though as it may, in the language of Mr. Justice McKenna, in the Winans case, correctly quoted in appellants' brief:

> "How the treaty in question was understood by the Indians may be gathered from the circumstances."

And in the interpretation of the language used, it is to be construed:

> "Not according to the technical meaning of its words to learned lawyers, but in *the sense in which they would naturally be understood by the Indians.*"

As stated by the Supreme Court of the United States in Jones vs. Meehan, 175 U. S. on p. 11:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was

pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, *are a weak and dependent people*, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but *in the sense in which they would naturally* be understood by the Indians."

What then were the circumstances surrounding the making of the treaty, and what was the meaning or significance of the language used as the same must have "naturally" been understood by the Indians? It was a well known, fully recognized and established fact that not a foot of the ground embraced within the Indian reserve could be cultivated or made productive, either as a grazing or farming country, without water for irrigation. Without water it would remain for all time to come, a dry, arid, and barren waste. Indeed, in the

language of appellants' counsel, "the land would be worthless without water". From time immemorial these Indians and their fathers had enjoyed and exercised "the uninterrupted privilege of fishing" in the waters of this stream from its source to its mouth. They had that right then and they have it now throughout the length of the stream which still remains a part of the reservation.

Can there be any question as to how these Indians must "naturally" have understood the treaty of 1888? Why, at that time, not a drop of the waters of the stream was or had ever been taken from its channel by a white man for any purpose. The entire stream was then and always had been a part of the Indian country, and a part of the Indian reservation theretofore occupied by them. They and their fathers, from time immemorial, had seen the waters of the stream flow down past and through their reservation in abundance, and at no time had they known or seen the channel of Milk River other than as a flowing, living stream. When the extent and area of the new reservation was determined and defined by treaty and agreement, one half of the stream was specially, particularly, and carefully reserved as a part and portion of the reservation, and while at that time the Indians may not have made use of much, if any, of the waters for irrigating purposes, they knew that the very object and purpose which actuated them in consenting to a diminution of their territorial domain, to-wit:

"To obtain the means to enable them to become *self-supporting as a pastoral and agricultural people,*"

required the use of these waters to enable them to accomplish those very objects and purposes. With all of these things before them, it would be preposterous to assume that they understood their bargain with the Government in any other way than that there was secured and reserved to them the flowing, living stream as they had always known and seen it.

Indeed, why was it,—if it was not for the purpose of assuring, satisfying, and convincing the Indians by the most conclusive and persuasive evidence of which they, with their limited knowledge and experience, and in their narrow intellectual capacity, could have any conception, that they had in fact and in law secured and reserved, and that they would at all times have for their undisturbed use and enjoyment, the necessary waters to carry on the industrial pursuits and exercises all other rights secured to them by the treaty—that the initial point of the boundary line of the Ft. Belknap Reservation was placed:

"*In the middle of the* main channel of Milk River opposite the mouth of Snake Creek",

and then after defining the western, southern, and eastern boundaries, again returned and extended:

"to a point in the *middle* of the main channel

of Milk River opposite the mouth of Peoples Creek, and thence up Milk River, in *the middle of the main channel thereof*, to the place of beginning."

25 St. at L. p. 124.

Why this precise, careful and emphatic language in defining the center of the river as the northern boundary line, thus making and constituting the one half of the main channel of Milk River with its waters a part and portion of the reservation, if it was not the intention, as well as the understanding, of the parties to this treaty, that the waters, absolutely demanded for the consummation of the purposes and objects for which the reservation was established, should enure to the benefit of the Indians as much so as any other part or portion of the premises confined within the boundaries laid down.

Nor did the Government interpret or understand the treaty in any other way. In fact counsel themselves say that "the irrigation and cultivation of Indian lands" is the policy of the Government. It never did claim, nor does it now assert, that there was a surrender by the Indians of their rights to the waters of the stream. It knew that the agricultural, pastoral and other pursuits mentioned in the treaty could not possibly be carried on without the use of these waters. It did not ask for, and it did not get a surrender of the fishing rights and privileges, or any other right held by the Indians in and to the waters of the stream, on the contrary, the stream itself was incorporated in and made a part of the reserva-

tion. It knew that the waters of the river were, in the language of the Supreme Court in the Winans case, "not much less necessary to the existence of the Indians than the atmosphere they breathed", and in order to fulfill the treaty obligations to which it had become solemnly bound, it then and thereafter appropriated and expended large sums of money to enable and to assist said Indians to

"*enclose and irrigate their farms.*"

Article II, Treaty of October 9, 1895; 29 St. at L. 351.

And the fact is that the larger portion of the funds provided for the advancement and improvement of the Indians by the terms of these various treaties and agreements, was used and expended in the construction of dams, canals and water ways with and through which to utilize the waters of Milk River for irrigation and other useful and beneficial purposes upon the reserve.

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IV.

We have now come to a consideration of the case of

KRALL VS. UNITED STATES,

which arose in the District of Idaho, was decided by this Court in 1897, and upon which the counsel for appellants seem to rely with a considerable display of confidence. They say, in effect, that the questions involved here were

determined adversely to the Government there, and that the principle enunciated in the Krall case, is determinative in favor of appellants in the case at bar. That counsels' assumtion, as to the operative effect of the decision of this Court in the Krall case, is based upon false and erroneous premises, becomes clearly apparent upon a reading of the Court's opinion and an examination of the facts and circumstances upon which it is predicated.

Idaho was organized as a Territory, and a territorial government was established, on March 3, 1863. (12 St. at L. p. 808 et seq.). All lands embraced within the boundaries as defined, except Indian reservations, became a part of the Territory and were included within its territorial limits and "*jurisdiction*". (Sect. 1, p. 809). Its legislative power extended "to all rightful subjects of legislation consistent with the Constitution of the United States", (Sect. 6, p. 810), and "the constitution *and all laws of the United States,* not locally inapplicable", had "the same force and effect within said Territory as elsewhere within the United States". (Sect. 13, p. 813). The Act of Congress maintaining and protecting the owners of vested rights to the use of waters on the public lands acquired by appropriation, provided the same were "recognized and acknowledged by the local customs, laws, and the decisions of the courts," was passed in July 1866, (Sect. 2339 Rev. St.; 14 St. at L. p. 253), and during all of this time and thereafter "Cottonwood Creek", was a stream flowing upon and was embraced within the

public domain, to which class of lands the Act of July 1866 was applicable. The waters of Cottonwood Creek were therefore free and open to appropriation, provided the local customs, laws and the decisions of the courts recognized and acknowledged the acquisition of rights to the use of water by that means. It is and always was so recognized and acknowledged in Idaho, not only *as a means* to acquire a water right, but as the *only* and *exclusive* means of acquisition. The doctrine of riparian rights does not exist there. The courts of Idaho call it a "*phantom*", and it was then, is now, and always has been considered a stranger in the land. Appropriation, governed by the "maxim first in time, first in right" is the "*settled law*" there.

Drake vs. Earhart, 23 Pac. on p. 542.

In 1868 the War Department appropriated, for governmental purposes, 640 acres of land upon the banks of Cottonwood Creek, and procuring the same to be reserved "by presidential proclamation", established thereon a military post. But, in the language of the majority opinion of the Court, "the creation of the reservation for military post purposes did not destroy or in any way affect the doctrine of appropriation thus established by the government in respect to the waters of nonnavigable streams upon the public lands", nor, upon the same line of reasoning, would it have destroyed or affected riparian rights if they had existed and been recognized in that District. The Government became a

riparian proprietor, but in a country where the fact of riparian proprietorship conferred no privileges, and where riparian rights were not recognized or known. It located its establishment upon the banks of a stream, the waters of which had been, at all times prior thereto, subject to the operation of territorial customs and laws governing the right to the use of the waters, and the doctrine of riparian proprietorship, and the rights incident thereto, having been abolished, the acquisition of a right to the use of such waters in any way or manner other than as so defined and prescribed by such laws was barred and precluded. And if, as was held in the majority opinion of the Court, the government has, "in respect to the waters of nonnavigable streams upon *the public lands*" no "superior right to any which citizens can acquire", then, indeed, the government could acquire no greater right to the use of the waters of the stream than any citizen and resident of Idaho could have acquired by merely obtaining title to, and taking possession of, the land.

Such was the situation and such were the facts and circumstances in the Krall case, and clearly they are in every way and in every feature different from and dissimilar to those in the case at bar. In the Idaho case the lands were and, since the organization of the Territory, always had been a part of the public domain, here the lands in question never were or became public lands. There the waters of the stream were and always had

been subject to appropriation, under state and federal laws, here neither state nor federal laws providing for the appropriation of water ever were or became operative upon them. There the government came in substantially like any other person taking possession for private and proprietary uses of a portion of the public domain. Here the lands and waters, and the rights incident and appertaining thereto, had never been held in any other capacity than that of reserved or proprietary ownership. There the particular uses and purposes for which the reservation was established did not imply or even give rise to the inference that for its existence and maintenance the use of the waters of the stream would be required, but here it was known and understood that the waters and the use thereof were a *sine qua non* as much so as the land itself. There the rights incident to riparian proprietorship were entirely wanting, here they are fully recognized and enforced. There the Government did not acquire proprietary riparian ownership until it selected from the public domain, thus subject to the limitations which the policy of the territorial government imposed, the tract in question for governmental uses, here the government and the Indians, from time immemorial, have been proprietary riparian owners, free from and independent of any state or federal legislation concerning public lands and waters. And when the formerly more extensive territorial domicil of these Indians was reduced, they expressly reserved the waters

and the use of the waters of Milk River for their use and enjoyment at and upon their place of abode. This reservation, therefore, and everything appertaining thereto and connected therewith, was *not one* established, in the language of the majority opinion in the Krall case,

> "subsequent to the time when the government, by its conduct in recognizing and encouraging the local custom of appropriating the waters of the non-navigable streams upon the public lands for agricultural and other useful purposes, had become bound to recognize and protect a right so acquired," and, "subsequent, also, to the passage of the act of Congress of July 26, 1866, making statutory recognition of that right, and confirming the holder in its continued use,"

but on the contrary, its existence reaches way beyond.

Now, aside from the question of the reservation and the retention by the Indians of the waters and the right to the use of the waters of Milk River, as heretofore discussed; and aside from the consideration of other features in this case so greatly at variance with those of the Krall case, we take it that no one would pretend to say that the principle of that case is applicable in a locality where the doctrine of riparian rights is recognized as fully as it is in Montana. As conceded by the counsel for the appellants, in such case "the rights of riparian owners are to be determined by the state laws

and decisions," and such decisions are "conclusive on this Court."

Appellants' Brief, p. 30.

As stated in Kinney on Irrigation, commenting on the decision of the Supreme Court of the United States in Sturr vs. Beck, 133 U. S. 541, involving the rights of an appropriator of water as against the rights of a riparian owner, in a locality where both rights were recognized and enforced:

> "It settles the law that there are in certain jurisdictions which recognize and protect the common law theories of riparian rights in the arid region *two distinct water systems*—one based upon a possessory right by the mere appropriator of the water to some beneficial use or purpose, and the other based upon the ownership of the land through or adjoining which the stream flows. This also settles the case that except in those States and Territories which have enacted statutory provisions *abolishing what is known as the common law riparian rights*—those riparian rights will be protected by the highest judicial tribunal in the country, as against all subsequent appropriators of water naturally flowing over or adjoining the lands."

Kinney on Irrigation, Sec. 220.

And that they are recognized, protected, and enforced by the highest tribunals in the State of Montana is conclusively settled, as we have shown, in:

Thorp vs. Freed, 1 Mont., 651.

Smith vs. Denniff, 24 Mont. 20.

Cruse vs. McCauley, 96 Fed. 369.

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Not only were the waters and the use of the waters of Milk River reserved to the Indians by the terms of the treaty of 1888, but they were actually appropriated. Upon this point counsel urge that while the affidavits filed on behalf of the several defendants tend to show that each of them has complied with the several requirements of the state law to make a valid appropriation of the waters of Milk River, there is no claim that the United States or any one in its behalf has complied with the law. In reply it would suffice to say, as repeatedly held by this Court, that the property and the property rights of the United States and its wards are not affected by state enactments.

McKnight vs. U. S., 130 Fed. 659.

Pond et al., vs. U. S., 111 Fed. 989.

The Supreme Court of Montana, in speaking of statutory requirements governing the acquisition of water rights by appropriation by private individuals, said:

"When the government had the reservation, it owned both the land included therein, and all the

water running in the near-by streams to which it had not yielded title. It was therefore unnecessary for the government to "*appropriate*" the water. It owned it already. All it had to do was to take it and use it."

Story vs. Wolverton, 78 Pac. p. 590.

So likewise in Nevada Ditch Co., vs. Bennett, 45 Pac. on page 484, the Supreme Court of Oregon said:

"In the Pacific Coast states, Congress has recognized the privilege of private citizens to acquire usufructuary interests in the waters of public streams independent of riparian ownership. This is but one way, however, of disposing of the public domain. A new and peculiar right is carved out of it and settled upon private persons, either in their individual or corporate capacity. Now if such an estate may be carved out of the public domain for an individual, it may be reserved by the general government; but the waters of nonnavigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, *without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals.* But if it would prevent individuals from acquiring interests by prior appropriation, it would seem that there should be a reservation made of such waters, either by act of Congress, or some executive order."

Such a reservation was made in this case. As has been seen, the purpose which induced the Indians to dis-

pose of those portions of their former holdings which they did not need for their "present or prospective wants", was to obtain the means to enable them to become "self-supporting, as a pastoral and *agricultural people,*" and in order to enable them to accomplish this policy, the government, on its part, agreed to furnish them the means, to supply "cows, bulls, and other stock * * * agricultural and mechanical implements," and "in order to encourage habits of industry and reward labor", it was expressly agreed between the contracting parties, that in the distribution thereof, preference should be given "to those who in good faith undertake the cultivation of the soil, as a means of obtaining a livelihood." But to do this—that is to cultivate the soil "as a means of obtaining a livelihood,"—the waters of the stream were as imperatively needed and required as the soil itself, as was fully known not only to the government but to the Indians as well. Both soil and water were there, and in order to satisfy the Indians in, to them, the most convincing manner that they were to have and retain both soil and water, the boundary line of the reservation was placed in the center of the stream. This was, in the language of the Supreme Court in Sturr vs. Beck, 133 U. S. 541, an "appropriation of both land and water" which, according to the decision in that case, carried with it the right to the use of the water.

Not only was this in fact and in law an appropriation of both land and water, but in the language of Judge

Field in Carpenter vs. U. S., 111 U. S. 347, it was "*notice*" to the world that the waters in question, and the whole thereof, if necessary, would be used for the purposes enumerated in the treaty.

Thus in Schwab vs. Beam, 86 Fed. on pp. 42-43, a case decided by Judge Hallet in the U. S. Circuit Court of the District of Colorado, a state where the doctrine of appropriation is recognized and enforced to its fullest extent, and the Judge delivering the opinion, himself, as he states:

> "An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained" in that state, and desiring "to recognize and enforce the principle on which it stands in every case to which it may be applicable,"

in discussing the rights incident to a placer location upon the banks of a stream to use the waters of the stream in the working of the claim, said:

> "A placer location *ex vi termini* imports *an appropriation of all waters covered by it*, in so far as such waters are necessary for working the claim. This is true especially when the location covers both banks of the stream, because there is a *reasonable presumption* that the locator intends to work the channel and the banks, wherever he may find pay dirt. A placer claim cannot be worked without water."

See also:

Crandall vs. Woods, 8 Cal. 136.

So in this case, the reservation cannot possibly be farmed or cultivated without water, but that it was designed and intended to be farmed and cultivated, does not rest here, as in the Schwab case, *supra*, simply on a "reasonable presumption", but such is the expressly declared and defined object of its establishment and existence.

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V.

A great deal is contained in the brief of counsel for the appellants concerning grants of this and grants of that, assumed by them to have been made by the general government, and much is sought to be made out of the fact that by the third section of the Act of Congress ratifying the agreement, (25 St. at P. p. 133), the lands not embraced within the boundary lines as fixed in the instrument defining the limits of the reservation, were made a part of the public domain and open to the operation of certain laws governing in the acquisition of title to public lands. Of course, it should be noted that the very section of the statute relied on is applicable only to such "lands to which the *right* of the Indians is extinguished under the foregoing agreement," and it is well settled that "where rights claimed under the United States are set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them."

Leavenworth R. R. Co. vs. U. S., 92 U. S. 733.

It is not claimed or asserted by the learned counsel that by the provisions themselves of this Act any rights were conferred upon prospective settlers to the use of the waters of Milk River, but they contend that as the lands ceded by the Indians were expressly made subject to entry under the homestead and desert land laws, and as they would be "worthless without water", that of necessity the waters of the stream became likewise subject to appropriation for use upon the lands, because upon any other hypothesis, counsel say, "the Act of Congress throwing open to settlement the land purchased from the Indians became a nullity, for the reason that the lands were not capable of being settled under the laws applicable to them without the use of the water". Just upon what basis or theory of reasoning a presumption of that kind should be invoked and applied in behalf of defendants, and denied as regards the Indians, whose lands, reserved to them for "agricultural pursuits", are, as to productiveness without water, in precisely the same situation as are the lands of the defendants and that ceded by the Indians, it is hard to conceive. Besides, the mere fact that the land had been opened to entry imposed no obligation on any of the defendants to make entry, but which, if made, was made with notice of and subject to existing rights.

It is undoubtedly true, as counsel say, that the Act of March 3, 1877, as amended in 1891, commonly known as the "Desert Land Act", and under the provisions of

which some of the defendants are said to have acquired their lands, recognizes the doctrine of appropriation under state laws, but whatever rights or privileges the Act in question grants or confers, they are and shall be, in the very language of the Act:

"subject to existing rights."

1 Supp. Revised Statutes, p. 137.

And the rights of the Indians to the use of the waters were "existing rights", reserved and secured to them by the provisions of the treaty. As was said by the Supreme Court of the United States in R. R. Co. vs. Roberts, 152 U. S. on pp. 117-118:

> "It has always been held that the occupancy of lands set apart by statute or treaty with them for their use, *cannot be disturbed* by claimants *under other grants of the government.*"

Cruse vs. McCauley, 96 Fed. on p. 374.

Besides:

> "All grants of this description are strictly construed against the grantee. Nothing passes but what is conveyed *in clear and explicit language.*"

Story vs. Wolverton, (Mont.), 78 Pac. 589 and cases cited.

Moreover, that these very laws do not authorize or justify, in the light of the facts and circumstances of this case, any interferences with the rights of the government

and the Indians to the use of the waters of Milk River, was clearly settled in the Rio Grand case, where the Court, speaking of the limitations upon the right of appropriation under state laws, said:

> "That in the absence of special authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary *for the beneficial uses of the government property.*"
>
> U. S. vs. Rio Grand D. & I. Co., 174 U. S. on p. 703.

And that no such "special authority" has not as yet been conferred by any of the acts of Congress relating to the appropriation of waters so as to justify by virtue thereof, interference by appropriators with the use of waters "necessary for the beneficial uses of the government property", becomes clear from the decision in the Rio Grand case, *supra*, because each and every one of the federal statutes, relating to the appropriation of waters, was fully considered by the Court, to-wit: The Act of 1866, being now Sect. 2339 Rev. St.; the Act of 1877, the Desert Land Act, and the Act of 1891, providing for the right of way over and across government reservations for canals and water ways.

To the same effect:

> Gutierres vs. Albuquerque L. & I. Co., 188 U. S. 545.

Mindful of the important questions at issue in this case, involving the very existence of the Indians, and their right to hold and enjoy the little they have managed to preserve and retain of their former once extensive possessions, we have discussed somewhat fully and at length the several propositions which we deem controlling and decisive of this controversy. And in submitting the case we say that, in the light of the facts and the law applicable thereto, there cannot be the shadow of a doubt but that the order of the trial Court in granting the temporary injunction was properly and rightfully made, and the same should be affirmed.

Respectfully submitted,

CARL RASCH,

United States Attorney.